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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/532,770	04/27/2005	Jordi Torno I Blasco	5000-0123PUS1	2378

2292 7590 11/22/2006

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EXAMINER

PAK, JOHN D

ART UNIT	PAPER NUMBER
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1616

DATE MAILED: 11/22/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/532,770

Applicant(s)

BLASCO ET AL.

Examiner

JOHN PAK

Art Unit

1616

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 06 November 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

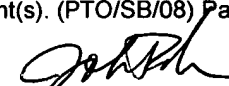
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: NONE.
Claim(s) objected to: _____.
Claim(s) rejected: 1-9, 11-20 [see box 11].
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.


JOHN PAK
PRIMARY EXAMINER
GROUP 1600

Continuation of 11. does NOT place the application in condition for allowance because of the following reasons.

First, it is noted that applicant has corrected the improper multiple dependent deficiency in claims 16, 17 and 20. These claims were not further treated on the merits in the previous Office action, but they can now be included in the outstanding ground of rejection under 35 USC 103(a) because the issues are the same.

Second, all of applicant's arguments pertaining the supposed nonobviousness of the claimed invention are found unpersuasive.

1) Applicant's argument that it would not have been obvious to combine two known fungi controlling agents to produce a mixture of fungi controlling agents is most unpersuasive. Combination of two known substances for the purpose of providing a third substance, i.e. a mixture, for the same utility is a well established concept in the pest control field. This is borne out by the teachings of the cited references. Both WO 98/46607 and Eicken et al. teach that their fungicides are to be combined with other fungicides.

2) Applicant criticizes the fact the references do not specifically disclose the specific combination being claimed -- well, that is the reason why this rejection is not made under 35 USC 102. If specifically taught, that would be an anticipation-based, not obviousness-based rejection.

3) Applicant goes on to argue that the specifically disclosed secondary fungicidal components in WO 98/46607 are not structurally similar to applicant's formula II compounds. This argument is unpersuasive. The WO reference explicitly teaches:

The compositions of this invention can also comprise other compounds having biological activity, e.g. compounds having similar or complementary pesticidal activity or compounds having plant growth regulating, fungicidal or insecticidal activity. These mixtures of pesticides can have a broader spectrum of activity than the compound of general formula I alone (page 17, lines 7-12).

Similarly, Eicken et al. explicitly teach:

In these application forms, the agents according to the invention may also be present together with other active ingredients, for example herbicides, insecticides, growth regulators, and other fungicides, and may furthermore be mixed and applied together with fertilizers. Admixture with other fungicides frequently results in a greater fungicidal action spectrum (column 35, lines 16-22).

Therefore, both the WO reference and Eicken et al. provide ample motivation to the ordinary skilled artisan in this field to combine applicant's trizaolopyrimidine of formula I with formula II compounds with the expectation that at least combined activity and broader fungicidal spectrum would be obtained. In this regard, the Examiner further adopts and incorporates by reference the full rationale for obviousness set forth in the previous Office actions. The examples of specific secondary pesticides or fungicides set forth in the paragraph bridging pages 17-18 in the WO reference and in columns 35-37 of Eicken et al. are striking in the diversity of their structures. Such teachings would have further motivated the ordinary skilled artisan to combine the two fungicides as claimed, because such teachings show that the two individual fungicides can be combined with numerous structurally divergent second active agents.

4) Applicant again argues the supposed unexpected results disclosed in the specification. The Examiner has provided a comprehensive analysis of why applicant's data is insufficient in the previous Office action, and the discussion there is incorporated herein by reference -- see pages 5-9 of the Office action of 8/3/2006, in particular the table on page 8. The Examiner stands by the position that the data is not commensurate in scope with that of the claimed subject matter. Even in claims where both compounds are the same as the tested compounds, the scope is not commensurate because the applicant's tests used non-fungicidal amounts of II-5, i.e. applicant used non-fungicidal concentrations of compounds that are known to be fungicidal. This can hardly be considered as data which is commensurate in scope with the claims when the claims read on both fungicidal and non-fungicidal amounts of II-5.